United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1447

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-1447

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTONINE PETIT, and YANICK PETIT, on Behalf of Themselves, and all Aliens in the United States similarly situated,

Appellants-Plaintiffs,

v.

LEONARD H. CHAPMAN, as Commissioner of the Immigration & Naturalization Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Appellees-Defendants.

REPLY BRIEF FOR APPELLANTS-PLAINTIFFS

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On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR APPELLANT

POINT I

ALL FOUR APPELLANTS HAVE STANDING TO CHALLENGE THE SERVICE POLICY

The appellees have offered a completely erroneous analysis of appellant's standing in this case. They allege that Noel and Petit, the deportable aliens, could not have come into court as aggrieved parties "on the day of the change in policy under attack in this case or the day of the subsequent modification of that policy." (Appellees' Brief, p.10) Thus they could not be heard at a later time to challenge the policy. We continue to urge that the Administrative Proced-

ure Act required publication of the new Service policy in the Federal Register and a chance for aggrieved parties such as appellants to be heard in opposition. But in any event, as of the date the policy went into effect, July 31, 1972, Noel and Petit were admittedly not subject to it. However, the moment they married permanent residents, they became subject to the policy of July 31, 1972 and appellants became aggrieved and injured by the policy and had standing to challenge an order based upon it in court. In short, appellants were aggrieved not by the initiation of the policy but by its continued implementation.

The Supreme Court has defined standing as follows in Sierra Club v. Morton 405 U.S. 727, 732 (1972):

> the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," Baker v. Carr, 369 U.S. 186, 204, as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen 392 U.S. 83, 101.

Certainly Noel and Petit have a high "personal stake in the outcome of the controversy." The dispute is being presented in an adversary context and in a form capable of judicial resolution. Thus they have standing in the present case.

None of the cases cited by the appellees support their position here. Railway Express Agency v. Kennedy, 189 F.2d 801 (7th Cir 1951) cert denied 342 U.S. 830 (1951) involved an attempt by a railroad carrier to challenge the payment of unemployment benefits to strikers

under a statute which allowed only those employees who were denied benefits to appeal. In Doehla Greeting Cards v. Summerfield, 116 F. Supp. 68 (D.D.C. 1953) the plaintiffs were held to have standing to challenge increased postal rates which they claimed were arbitrary and unreasonable.

In both Data Processing Service v. Camp 397 U.S. 150 (1970) and Barlow v. Collins 397 U.S. 159 (1970), plaintiffs were also held to have standing because they alleged a real "injury in fact."

Certainly a person ordered to be deported has suffered an injury and has always been considered as having standing to challenge that order. There is nothing conjectural or hypothetical about the direct injury to the plaintiffs here.

Appellees further argue that the resident alien appellants are not real parties in interest in this case. They rely on a number of cases which hold that if a spouse is legally deportable under a valid statute or regulation, the deportation order cannot be challenged by the remaining spouse on the grounds that the marriage will be destroyed if they are separated. See, e.g., Swartz v. Rogers 254 F. 2d 338 (D.C. Cir. 1958). In other words, the cases hold that the remaining spouse has no overriding right to complain of a deportation order greater than that of the deportable spouse.

Plaintiffs have no quarrel with that proposition. However in this case, they are challenging the validity of their enforced departure and the policy on which it is based. Certainly the remaining spouses will suffer an injury in fact if their spouses are deported. Then they have equal standing to complain in this case.

A final word is necessary on the government's argument on stand-

ing. The Service seems to argue that if it established the most arbitrary and unreasonable policy on deportation, it could do so without any court challenge. Suppose the Service has issued a directive that all white deportable aliens could remain in this country while their immigrant visas were being processed, but all black deportable aliens had to leave. The Service would then argue that:

(1) the policy could not be challenged administratively because it was not a rule required to be published in the Federal Register;

(2) black deportable aliens had no standing to sue because they were not injured on the day the policy went into effect.

(3) their remaining spouses were not real parties in interest.

Thus, according to this argument, the policy could never be challenged. A more absurd result could hardly be imagined.

POINT II

THE SERVICE POLICY IS BASED UPON ERRONEOUS ASSUMPTIONS, IS NOT REASONABLY RELATED TO ITS ALLEGED PURPOSE AND THE SERVICE POLICY VIOLATES EQUAL PROTECTION PRINCIPLES

The Service's main argument on the merits is that the policy under challenge is reasonably based on the Immigration and Naturalization Act as amended in 1965. The Act, as amended, provides that Western Hemisphere immediate relatives of U.S. citizens were not subject to a numerical quota. Thus, the Service argues, it is reasonable to grant such relatives extended voluntary departure dates even if they are deportable, since they "could obtain visas after only a few months." (Appellees Brief p. 22). But Western Hemisphere close relatives of resident aliens are subject to a numerical quota and are not given any preference in the grant of immigrant visas. Thus they must wait in line for the 120,000 visas issued per year, a wait that may take as long as two years. During that time, the appellees argue, they may be working in the United States and taking jobs away from American citizens. Under these circumstances the policy of requiring Western Hemisphere immediate relatives of resident aliens to leave the country until their immigrant visas are secured is a proper exercise of the Service's responsibility to administer the 1965 Act.

This argument depends upon a series of assumptions:

(1) Congress knew that the limitation on Western Hemisphere immigration would create a long wait for immigrant visas and therefore it implicitly approved a different treatment between quota and non-quota aliens as far as deportation and voluntary departure were concerned.

(2) The waiting time for non-quota immigrant applicants to obtain their visas is always only a few months.

(3) Sending Western Hemisphere immediate relatives of resident aliens out of the country until they obtain their immigrant visas is a reasonable, effective and appropriate manner of protecting the American economy;

(4) that the procedure comports with equal protection requirements of the Constitution.

Not one of these assumptions is supported by the legislative history of the 1965 Act, the manner in which it is administered, or the appropriate Constitutional decisions of the Supreme Court.

A. Legislative History

The Government's primary justification for the rigid dichotomy it is making between the relatives of American citizens and the relatives of permanent residents is that such discrimination is in furtherance of a Congressional purpose. But its policy cannot and should not be justified by reference to the differentiation which Congress has made between the immediate relatives of United States citizens and the relatives of permanent residents.

The primary source of legislative history for the 1965 Amendments to the Immigration & Nationality Act is found in Senate Report No. 748, September 15, 1965 (to accompany H.R. 2580) U.S. Code Congressional & Administrative News, 89th Cong. 1965 at page 3328-3352. The Report indicates a clearly enunciated legislative intent to grant preferential admission to aliens based on family relationships with either U.S. citizens or permanent resident aliens. In fact, as the following excerpts reveal, the concepts of close relatives of citizens and close relatives of permanent residents are always linked together in a single thought:

> "In addition to numerous technical and minor changes, the Bill would also make other basic changes in the Immigration & Nationality Act, as follows:
>
> > 1. A new system of preferential admission based upon the existence of a close family relationship with U.S. citizens or permanent resident aliens, and upon the advantage to the United States of the special talents and skills of the immigrant, is established. (U.S. Cong. & Admin. News 1965, P. 3328-3329)

. . .

STATEMENT

"The Bill H.R. 2580, as amended, does not embody a comprehensive revision of the Immigration & Nationality Act, but has as its primary objective the abolishment of the National Origin Quota System for the allocation of immigrant visas and the substitution of a new system of allocation based on a system of preferences which extends priorities in the issuance of immigrant visas to close relatives of U.S. citizens and aliens lawfully admitted for permanent residence...(U.S. Cong. & Admin. News 1965 - pp. 3329-3330)

* * * *

In place of the National Origins System, the Bill establishes a new system of selection designed to be fair, rational, humane, and in the national interest. Under this system emphasis in the selection for among those eligible to be immigrants within the annual numerical ceiling of 170,000...will be based on the existence of a close family relationship to U.S. citizens or lawful resident aliens regardless of the birthplace of the alien. Reunification of families is to be the foremost consideration. The closer the family relationship the higher the preference. (U.S. Cong. & Admin. News 1965 p. 3352).(Emphasis added)

The above referenced paragraphs indicate a clear Congressional intent to keep families united. In expressing such intent, the Legislative report invariably links together close relatives of citizens with close relatives of permanent residents. While it is true that the immediate relatives of citizens are given a higher level of priority, it is clear that Congress was motivated by the same spirit and the same humanitarian goals in providing immigration

benefits for both the relatives of citizens and the relatives of aliens. While it is also true that some of the above quoted language applies only to provisions of the Bill providing for immigration under the worldwide quota of 170,000, and not the Western Hemisphere quota, there is certainly no reason to impute a different legislative attitude to Congress with regard to Western Hemisphere immigration. In fact, there is certainly no reason to believe that Congress intended to be more stringent when it came to Western Hemisphere immigration than it was with respect to the rest of the world. In this regard, the Senate Report indicates that the restrictions which were placed upon the Western Hemisphere were intended to ensure only that Western Hemisphere natives did not continue to enjoy the preference which the law had previously provided . . .

> "To continue unrestricted immigration for persons born in Western Hemisphere countries is to place such aliens in a preferred status compared to aliens born in other parts of the world which the Committee feels requires further study. (U.S. Cong. & Admin. News 1965 p. 3336)

Notwithstanding the avowed Congressional purpose of placing the Eastern and Western Hemisphere on an almost equal footing, the tremendous increase in the number of applications for immigrant visas by natives of Western Hemisphere countries created an inequality which Congress did not foresee or intend. In the Report, (U.S. Cong. & Admin. News 1965 p. 3336) the Committee noted that the flow of immigration from nonquota (Western Hemisphere) countries averaged approximately 110,000 admissions over the ten proceeding years. The

Report also noted that non-quota admissions from Western Hemisphere companies totaled 139,284, in the year proceeding the Report. While the Report also indicated the expectation that the increase would continue it is, nonetheless, fair to state that Congress could not have anticipated a situation where the wait for an immigrant visa would be longer than two years, (resulting from a backlog of over 240,000 applicants above the 120,000 limitation).

If appellees' interpretation of the Congressional intent is correct, we must conclude that Congress intended that only the families of citizens, and permanent residents born in the Eastern Hemisphere were worthy of remaining together in the United States. The above quoted language in the Senate Report, however, evidences no such intent. To assume, as do appellees, that Congress intended to discriminate so heavily against the relatives of permanent residents born in the Western Hemisphere would certainly be contrary to the clear Congressional intent of equalizing the regulation of Eastern and Western Hemisphere immigration so that Western Hemisphere countries would not continue to enjoy an unfair benefit. It is clear that the greatly increased and unanticipated demand for visas has caused the pendulum to swing sharply in favor of those fortunate enough to have been born in the Eastern Hemisphere.

Appellants respectfully submit that the District Directors of the Immigration Service have been entrusted with discretion primarily to ameliorate human hardship and to soften the impact of the law when changing situations have made it harsher than Congress could possibly have intended. The above quoted language indicates that Congress certainly did not intend to penalize natives of the Western Hemisphere

by compelling their families to remain apart for periods as long as two years. The District Director of the Immigration Service, therefore, should have used his discretion to ensure that such result did not flow from a statute. Instead, seizing upon the technical distinction in order of priority between immediate relatives of citizens and relatives of permanent residents, the District Director has acted to sharpen the harshness of the law and has wrongfully refused to use such discretion to ameliorate a difficult situation.

On the basis of the above, we respectfully submit that the unwarranted discrimination cannot be supported by reference to Congressional purpose.

Furthermore, once Congress' attention had been drawn to this problem, it has moved to correct the situation. As appellees admit in their brief, H.R. 981 (93 Cong. 1st Sess.) would eliminate the current distinctions and would grant preferences to all immediate family members (of both citizens and resident aliens). This would eliminate the long wait for immigrant visas by Western Hemisphere family members. It is a clear indication that Congress did not anticipate or desire different treatment between the two groups involved.

As Congressman Frey said just before the House voted on the bill,

> "H.R. 981 will give top priority to reuniting families by applying the Eastern Hemisphere preference system to Western Hemisphere immigrants." (119 Cong. Rec. H 8346)

The House passed H.R. 981 on September 26, 1973 by a vote of 336-30. 119 Cong. Rec. H. 8346 (daily ed. September 26, 1973) It is now awaiting action in the Senate.

B. Waiting Time For Non-quota Immigrant Visas

Appellees make the assertion in their brief that alien relatives of citizens "could obtain visas after only a few months." (P.22). There is no factual support for this statement anywhere in the record. If the appellees are asking this court to take judicial notice of this alleged fact, they have not laid any basis for doing so. This allegation is at the heart of their argument that different treatment is required between the two groups in question in this litigation. If in fact a significant number of alien relatives of citizens must wait as long for their visas as the alien relatives of resident aliens, the entire structure of appellees argument collapses.

Appellees statement proceeds on the assumption that every application by alien relatives of citizens is equally free of difficulty and proceeds at the same speed. But the Act and regulations provides for a series of checks which the Service and State Department are required to make of every applicant for immigrant status, including alien relatives of citizens. These include the approval of immediate relative petitions by the Service (often involving lengthy interviews of citizens and their spouses and investigators into the validity of marriages) and visa processing with the appropriate consular office requiring obtaining and submission of numerous records and documents, e.g. police certificates, court records, birth and marriage records, etc. Additionally, the applicant must

wait for the consular office abroad to formally schedule a visa-appointment for him. The process almost always takes more than a few months, and sometimes takes years.

Common sense tells us that many thousands of alien relatives of citizens must be carefully screened to see if they fulfill the requirements of the act. Thus, if their waiting time often takes as long as that of alien relatives of permanent residents, the key assumption on which the Service policy depends loses its force.

C. Effect On The Labor Market.

In our main brief we have dealt with the government's argument that the policy in question is a reasonable manner of protecting the American labor market. As noted previously, the policy is both underinclusive and overinclusive and therefore is irrational in equal protection terms. It is overinclusive since it demands that all Western Hemisphere alien relatives of resident aliens leave the country whether or not they may be in the labor market. The Service has established the most pernicious and inexpedient method for dealing with the alleged labor problem. Instead, it could refuse employment authorization for aliens awaiting visa availability, or it could require a non-employment bond as a condition of continued presence in the United States. Instead, it established a blanket requirement that all alien relatives of resident aliens must leave the country whether or not they are working or whether or not their employment would hurt the labor market in any way.

Furthermore, the policy is underinclusive. If the Service was really concerned about protecting American citizens from job compet-

ition from aliens who have not yet achieved immigrant status, it should insist that all alien relatives of citizens also leave the country. Since there are 200,000,000 citizens and only 4,000,000 resident aliens the former constitute a far larger target group for illegal aliens marrying Americans and remaining here to work. Yet the Service has explicitly rejected the latter alternative.

In addition the alien relatives of resident aliens will eventually return to the United States when their immigrant visas are issued and enter the labor market then. Thus the Service policy is not rationally related to its alleged purpose and goal.

D. Violation of Equal Protection.

The Service has adopted a policy that violates the equal protection clause in at least three different views.

First, the policy violates the Supreme Court's explicit holding that "classifications based on alienage are 'subject to close judiscrutiny.'" Sugarman v. Dougall, 413 U.S. 634, 642 (1973).

Secondly, the policy attacks a fundamental right of the alien relatives and the resident alien spouses, the right to remain in this country and to remain united with their family members.

Thirdly, the policy shows the classic example of a weak, discrete and insular minority being severely punished by administrative action while a larger group in precisely the same situation but possessed of stronger political power, is left alone.

The Supreme Court in the Sugarman case indicated that discrete and insular minorities, such as aliens, can secure the assistance of federal courts applying equal protection principles. It quoted from the famous Carolene Products footnote of Mr. Justice Stone which

suggested that legislation restricting the rights of "discrete and insular minorities....may call for a correspondingly more searching judicial inquiry." United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938) A fortiori, an administrative practice not santioned by any statute that restricts the rights of such minorities must be carefully examined. The Supreme Court concluded in Sugarman, that there must be a substantial state interest to justify legal restrictions against aliens.

Appellees seek to distinguish the recent Supreme Court cases dealing with aliens on the ground that they dealt with State statutes restricting alien rights. However, many recent cases dealing with federal restrictions on alien rights have also come before the courts which have declared them invalid. See Hampton v. Mow Sun Wong, F.2d (9th Cir. January 25, 1974); Cert. granted 42 LW 3678 Ramos v. United Civil Service Commission, (three judge court) 376 F., Supp. 361 (D.P.R. 1974); Weinberger v. Diaz; 361 F. Supp. 1 (S.D. Fla. 1973), prob. jurisd. noted, 42 LW 3631 (1974).

CONCLUSION

For the reasons noted above, it is respectfully requested that the decision of the district court be reversed and that an injunction issue against the INS order involved in this case.

Respectfully submitted,

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